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Nos. 191–192

In the Supreme Court of the United States

October Term, 1940

The United States, appellant

v.

Kate B. Goelet and E. Field Goelet, Jr., Executors of the Estate of Edward F. Goelet, Deceased

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Kate B. Goelet and E. Field Goelet, Jr., Executors of the Estate of Edward F. Goelet, Deceased, appellants

v.

The United States

ON APPEAL AND CERTIORARI FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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CITATIONS

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No. 191

THE UNITED STATES, APPELLANT

v.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED, APPELLANTS

v.

THE UNITED STATES

ON APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 49–56) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered April 1, 1940 (R. 56). The appeal of the United States (No. 191) was taken and allowed on June 19, 1940 (R. 57), and the cross-appeal (No. 192) was taken and allowed on June 25, 1940 (R. 62–63). This Court noted probable jurisdiction on October 14, 1940. The jurisdiction of this Court rests on the Act of April 18, 1934, c. 150, 48 Stat. 1322. See Appendix, pp. 83–84.[1]

QUESTIONS INVOLVED

The United States leased a number of towboats and barges to the plaintiff under an agreement reserving to the latter an option to purchase. The Secretary of War seized the vessels, the seizure, as the court below found, being tortious and unauthorized. This suit was brought against the United States under a special jurisdictional act.

1. The question on the appeal of the United States (No. 191) is whether interest is allowable against the United States either under the Fifth Amendment or by reason of the provision of the jurisdictional act conferring jurisdiction on the Court of Claims to "render judgment on the claims [of the plaintiff] for just compensation * * *."

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[1] In addition to the appeal and cross-appeal, the United States and the cross-appellants each also filed a petition for certiorari, against the contingency of the Court's holding that appeal would not lie. The Court has not acted on these petitions for certiorari.

2. The principal question on the cross-appeal (No. 192) is whether the damages awarded by the Court of Claims are inadequate.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix.

STATEMENT

On May 28, 1919, a contract was entered into between the United States, represented by the Chief of Engineers, and the plaintiff [2] providing for the lease to the plaintiff of nineteen barges and four towboats for a period of five years after the delivery of the first towboat or barge (Fdg. 6, R. 31, R. 15–20). The plaintiff agreed to operate the fleet as a "common carrier" on the Mississippi River and its tributaries for the period of the lease at rates "not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War" (R. 16). The contract reserved to the plaintiff an option to purchase the vessels within three months prior to the expiration of the lease, or sooner (R. 18). The contract provided that the Chief of Engineers, as

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[2] Upon the death of Edward F. Goltra, the original plaintiff, on April 2, 1939, his executors, Kate B. Goltra and E. Field Goltra, Jr., were substituted as parties plaintiff in the court below (Fdg. 1, R. 29), and are the appellees in No. 191 and cross-appellants in No. 192. Plaintiff, when used in this brief, refers to Edward F. Goltra or his executors. Defendant, when used herein, refers to the Government.

lessor, could terminate the lease at any time if, in its judgment, the lessee failed to comply with the terms of the agreement (Par. 8, R. 19–21).

No fixed rental was reserved for the period of operation under the lease. The contract provided, however, that all net earnings under the lease were to be deposited to the credit of the Secretary of War, and that the earnings should be applied to the payment of the purchase price in the event the lessee exercised his option to buy (R. 17–19). Sections 5 and 6 of the agreement made provision for the method of fixing the purchase price and for the method of payment if the plaintiff elected to purchase the fleet. The current value of the fleet was to be determined by appraisers appointed by the parties (R. 18). If the earnings deposited to the credit of the Secretary of War equalled the original cost of the ships plus 4% interest from the respective dates of delivery, the earnings were to be applied to payment in full for the fleet, any excess to be returned to the lessee (Par. 5 (a), R. 18–19). If the earnings were less than cost plus 4% interest, but greater than the appraised value, the fleet was to become the property of the lessee, and any earnings in excess of the appraised value were to be retained by the Government (Par. 5 (b), R. 19). If, however, the earnings were less than the appraised value, they were to be applied to payment of the fleet, and the lessee was to pay the amount by which the earnings fell short of the appraised value. The contract further provided

that the balance due on the purchase price after applying the earnings should be paid in fifteen equal annual installments with interest at 4% beginning one year from the date of the sale (Par. 6, R. 19).

The average original cost of each of the tow-boats was $375,000, and of the barges $110,000, a total of $3,590,000 (R. 66). The value of the fleet at the time of the seizure was approximately the same (R. 67).

On July 15, 1922, the fleet was delivered to the plaintiff by the Government (Fdg. 15, R. 34). The vessels were operated on a very limited scale (Fdgs. 17, 35, R. 35, 42), and on December 1, 1922, plaintiff placed the fleet in winter quarters (Fdg. 18, R. 36). On January 29, 1923, the District Engineer, pursuant to instructions from the Secretary of War, informed the plaintiff that various organizations interested in transportation on the Mississippi River had complained to the Secretary of War of the inactivity of the fleet, and that a failure to operate at maximum capacity would be regarded as a violation of the contract (Fdg. 20, R. 37–38). Subsequently, while the boats were still tied up, the Secretary of War, on March 3, 1923, notified the plaintiff that because he had failed to comply with the terms of the contract, the contract was terminated (Fdg. 23, R. 39). The plaintiff refused to redeliver the fleet to the designated official (Fdg. 25, R. 40). On March 25, 1923, pursuant to orders

of the Acting Secretary of War, the boats were seized and possession taken by the United States (Fdgs. 28, 29; R. 41). On April 27, 1923, the plaintiff was notified by the Chief of Engineers that in his judgment plaintiff had failed to comply with the terms of the contract and that therefore he was terminating it. The letter was signed at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers (Fdg. 38, R. 43-44).

Plaintiff brought suit to enjoin the Secretary of War from seizing the fleet, and possession of the vessels was temporarily restored to the plaintiff pursuant to court order entered on September 4, 1924 (Fdg. 39, R. 44). This suit was concluded by a judgment of this Court against the plaintiff (*Goltra* v. *Weeks*, 271 U. S. 536), and defendant resumed possession in the summer of 1926 (Fdg. 40, R. 44). In its opinion this court assumed that the Chief of Engineers, as lessor representing the United States had, without fraud, exercised his judgment in terminating the contract, and it held, on this assumption, that the contract had been lawfully terminated according to its provisions (Fdg. 40, R. 44). An amended complaint instituted by plaintiff was dismissed, in part on the ground that the decision of this Court was *res judicata*. *Goltra* v. *Davis*, 29 F. (2d) 257 (C. C. A. 8th), certiorari denied, 279 U. S. 843 (Fdg. 41, R. 44).

During both periods that the plaintiff was in possession of the vessels he operated at a loss (Fdg.

49, R. 45). The losses were due to the low water conditions (Fdgs. 17, 35, R. 35–36, 42), the substantial expenditures required to inaugurate service (R. 54, Fdgs. 43–48, 50–51, R. 45–46), litigation (R. 54), and the refusal of the Secretary of War to grant permission to the plaintiff to charge less than rail rates (R. 54, Fdgs. 8–14, R. 31–34).

This action was instituted in the Court of Claims on July 20, 1934, pursuant to the Act of April 18, 1934 (set out in the Appendix), which conferred jurisdiction on that court to hear, determine, and enter judgment upon the "claims of Edward F. Goltra against the United States for just compensation" for taking the vessels and unloading apparatus, whether "tortiously or not," and without regard to the statute of limitations, or to any previous court decisions.

In its petition below, the plaintiff pleaded as its first cause of action a breach or taking of the contract of May 28, 1919 (R. 1–11), and prayed for judgment on this claim in the amount of $10,150,419.04, plus interest (R. 12). In support of this claim, the plaintiff introduced evidence (R. 67–72, 73), and requested a finding (R. 68, 73) that at the time of the seizure the fleet had a remaining useful life of thirty years and that the rental value of the towboats was 1/15 of one percent per day, and of the barges 1/10 of one percent per day.

The Government introduced rebuttal evidence (R. 72–73), and requested the court below to find

that the remaining useful life was twenty years, and a rental value per day substantially smaller than that claimed by plaintiff (R. 69, 73).

As a second cause of action, the plaintiff alleged a breach or taking of a supplemental contract, which had been entered into by the parties on May 27, 1921 (R. 12–13, 21–22). Under this contract, the plaintiff provided a tract of land and concrete runways (Fdg. 50, R. 45–46), on which the United States constructed certain unloading apparatus at a cost of $210,000 for use in the plaintiff's operations under the lease (Fdg. 50, R. 46, 67). The contract permitted the plaintiff to purchase this apparatus on the terms and conditions governing the purchase of the fleet (R. 22). The plaintiff alleged that as a result of the breach or taking of the supplemental contract, the plaintiff lost the use of the unloading apparatus (R. 13) having a stipulated rental value of $25,000 annually (R. 67), that after the seizure of the apparatus it remained on plaintiff's land, plaintiff being deprived of the use and occupation of the land (R. 12), and that plaintiff employed watchmen to care for the apparatus (R. 13), incurring an expense in the stipulated amount of $125 per month for each watchman from the date of this Court's decision in *Goltra* v. *Weeks*, 271 U. S. 536 (R. 68). For these and other items of alleged damage, the plaintiff prayed for judgment on its second cause of action in the sum of $377,940.47, plus interest (R. 13).

he court below found that the Chief of En-
eers had not exercised his own judgment in
celling the contract, but had been coerced by
Secretary of War into cancelling the contract
sequent to the actual seizure of the vessels. It
ordingly held that the contract had not been
minated in accordance with its provisions, and
the seizure of the vessels was tortious. The
rt found that "Taking the amount of the
nterclaims and all the relevant facts and circum-
ces, including the expenses of plaintiff, into
sideration, the value for the lease, option to pur-
se, and all legal and equitable claims" was
,000 as of the date of the seizure (Fdg. 56,
49, 55). To this amount, however, it added
rest at six percent per annum "not as interest
as a part of just compensation, from March
923, to the date of payment."

oth parties appealed from the judgment. In
191, the Government assigns as error the al-
nce of interest (R. 57), and in No. 192, the
ntiff assigns as error the conclusion of the court
w that there was no market value for the lease
option to purchase the fleet (R. 62, 54), the
ire of the court to consider evidence of the
al value of the vessels (R. 62, 54), and the
ire of the court to make certain findings of
requested by plaintiff (R. 59-61), including,
ng others, requested findings as to rental value
he unloading apparatus (R. 61) and as to the

plaintiff's expenditures for watchmen (R. 61). For purposes of this appeal and cross-appeal, the parties have stipulated that the facts represented in the two requested findings mentioned, as well as in certain others, may be taken as true (R. 66–68), and the plaintiff now contends that the court erroneously excluded these two items from consideration in rendering its award.

SPECIFICATION OF ERRORS TO BE URGED [3]

The Court of Claims erred:

1. In holding that the Act of April 18, 1934, conferring jurisdiction upon it to entertain, hear, and render judgment on the claims of Goltra against the United States for just compensation for certain property taken, authorized it to award interest from the date of the alleged taking.

2. In holding that the use of the words "just compensation" in the Act called for the assessment of the same measure of damage as would apply to a taking of property by eminent domain.

3. In holding that the Act, in the absence of specific language expressly directing it so to do, authorized it to award interest.

4. In failing to hold that Section 177 of the Judicial Code precluded it from allowing interest on any claim against the United States prior to the time of the rendition of judgment.

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[3] This specification embraces only errors to be urged on the appeal of the United States, and not errors to be urged by the plaintiff on the cross-appeal.

5. In including in its judgment interest on the claim.

SUMMARY OF ARGUMENT

I

The Court of Claims erred in awarding interest from the date of the seizure of the vessels. Interest may not be recovered in a suit against the United States unless specifically provided for by contract or authorized by act of Congress (Judicial Code, Section 177), save that in eminent domain cases interest from the date of the taking is included in the recovery as a part of just compensation. *Jacobs* v. *United States*, 290 U. S. 13. There is no contention here that there was a contractual provision for interest, but the plaintiff claims interest on the grounds that his property was taken by eminent domain and that, in any event, the special jurisdictional act, by employing the phrase "just compensation," provides for the eminent domain measure of recovery, including interest.

A. There has been no taking of the plaintiff's property by eminent domain.

An unauthorized, and hence tortious, seizure or use of property by agents of the United States does not constitute an eminent domain taking by the United States. *Hughes* v. *United States*, 230 U. S. 24, 25. Further, it is laid down in the cases that a taking of possession of property on behalf of the United States under a claim of right to do so without paying compensation is not an eminent do-

main taking, whether the claim be well-founded or not. A seizure of property, under a claim that the United States is entitled to take possession by virtue of a contract, is not, for example, an eminent domain taking, *Klebe* v. *United States*, 263 U. S. 188, 191. Here the vessels were seized and the lease was terminated by agents of the United States under the claim that the United States was entitled to repossess the vessels and to terminate the lease by virtue of the term of the lease agreement (R. 38–39, 41, 43–44). While we now concede that this claim was ill-founded, the fact that it was advanced precluded an eminent domain taking of the plaintiff's rights under the lease agreement. Further, since the seizure of the vessels was not in accordance with the contract it was not authorized by the United States, and there is also brought into play the rule that an unauthorized seizure of property by agents of the United States is not an eminent domain taking.

It is hence clear that the seizure of the vessels and the termination of the agreement did not constitute, at the time of the seizure and termination, an eminent domain taking, for which the United States was obligated to make just compensation under the Fifth Amendment. However, the plaintiff's contention that the initially tortious conduct was "adopted" by the United States at some subsequent date, and was thereby transformed into an eminent domain taking as from the beginning,

necessitates further exploration of the principle that assertion of a claim of right inhibits an eminent domain taking. That inquiry compels us to acknowledged that the broad proposition enunciated in the decisions, that a taking of property for the United States under a claim of right to do so without compensation is not an eminent domain taking, involves and is qualified by the assumption that the taking is authorized by Congress only if the claim of right is well founded. If, in other words, agents of the United States seize property on its behalf under claim of a right to do so without paying, and it appears not only that the claim was ill founded but that the seizure was authorized by Congress (expressly or impliedly) even though the claim of right should prove to be ill founded, the seizure constitutes an eminent domain taking. For in such a case it may be said that Congress in effect authorized the eminent domain taking of whatever private property rights might subsequently be found by the courts to have been invaded by the seizure. Cf. *United States* v. *Lynah,* 188 U. S. ~~445, 465~~–467, 468. If, on the other hand, it cannot be said that Congress authorized the seizure regardless of whether it would invade private rights, there is no basis for saying that Congress has impliedly authorized an eminent domain taking: in this situation the principle that a taking under claim of right to do so without paying is not an eminent domain taking has valid application.

With *United States* v. *Lynah, supra,* compare *Tempel* v. *United States,* 248 U. S. 121. In the present case there is no contention that Congress authorized the seizure of the vessels even if it was in violation of the lease agreement. Hence the seizure, since it was in violation of the lease agreement, was merely tortious, and affords no claim for just compensation under the Fifth Amendment.

In support of his claim that the tortious seizure was subsequently adopted by the United States, and thereby changed into an eminent domain taking *ab initio,* the plaintiff relies on findings of the court below that the vessels were seized for the use of the United States (R. 41) and that the United States has retained and operated them (R. 44). These findings do not, according either to precedent or principle, establish implied congressional ratification of the seizure. The only cases which we have found in which this Court has held that the United States had tacitly ratified a mistaken or otherwise unauthorized seizure of property by its agents are *United States* v. *Creek Nation,* 295 U. S. 103, and *Shoshone Tribe* v. *United States,* 299 U. S. 476. These cases involved unauthorized seizures of Indian lands by agents of the United States, resulting in the *Creek* case from an erroneously surveyed boundary and in the *Shoshone* case from a mistaken belief that the Indians had consented. Subsequent disclosure of these mistakes did not bring restoration of the Indian lands, and the Court held that

the United States had ratified the seizures. These tacit ratifications rested on two factors: First, that the United States was under an affirmative duty to protect the rights of its Indian wards, and, second, that Congress had determined to permit the disposals of the lands by the United States to stand, regardless of whether they were violative of the rights of the Indians.

The first of these elements, as well as the second, is, we submit, essential to any such implied ratification. For the United States is under no affirmative legal duty to protect ordinary citizens, fully capable of securing redress in the courts, from illegal acts of Government officials. *Gibbons* v. *United States,* 8 Wall. 269, 274. And the United States does not become liable for unauthorized acts of its agents merely because it retains the benefits of those acts. *Hooe* v. *United States,* 218 U. S. 322, 333–334.

But in any event the other constituent of an implied ratification is also lacking here, that is congressional approval of the seizure in disregard of whether the claim of right under which it was made was well-founded. That such congressional approval is prerequisite to an implied ratification is plain not only from the *Creek* and *Shoshone* cases but from the discussion, *supra,* of the nature of the claim of right doctrine. It was there shown that in order for a seizure under claim of right to consti-

tute an eminent domain taking, not only must the claim of right be ill-founded but Congress must have authorized the seizure even in that contingency. Hence for subsequent congressional action to transform into an eminent domain taking a seizure which initially lacked authorization, it would have to involve congressional approval of the seizure in disregard of whether the claim of right on which it was based was well-founded.

Here there has been no such congressional approval of the seizure of the vessels and of the termination of the plaintiff's rights under the lease agreement. There is no indication that Congress had any knowledge of this controversy before the plaintiff's jurisdictional bills came before it. The Jurisdictional Act does not purport to ratify a wrongful seizure and its legislative history shows that Congress intended only to give the plaintiff "a day in court." House Report No. 828, 73d Cong., 2d Sess.; Senate Report No. 362, 73d Cong., 2d Sess.

Hence the only possible basis for implying a congressional ratification is that Congress by enacting the jurisdictional act made available to the plaintiff monetary relief, instead of directing that if the plaintiff's claim were ultimately upheld a new lease agreement should be tendered to him. And to find a congressional ratification in an omission to proffer relief in kind would transform into

an eminent domain taking almost any wrong for the relief of which Congress provided.

B. The jurisdictional act does not authorize an award of interest against the United States.

That act confers jurisdiction on the Court of Claims to "render judgment on the claims of Edward F. Goltra against the United States for just compensation" for the taking of certain vessels, "whether tortiously or not". The plaintiff contends, and the court below apparently held (R. 55–56), that the act, by employing the term "just compensation," provides for the eminent domain measure of recovery, including interest, regardless of whether there was an eminent domain taking.

In the first place, it is probable that the words "just compensation" in the act are simply Goltra's description of his claims, and not a measure of recovery at all; for it is unlikely that Congress meant to do more than to give the plaintiff the same standing in the Court of Claims as any other claimant. But if "just compensation" is used to prescribe a measure of recovery, there is no basis for concluding that Congress used the words in their technical eminent domain sense as a back-handed way of providing for interest. The words "just compensation" are not words of art commonly importing an obligation to pay interest, nor are they used solely to refer to the eminent domain measure of damages: "just compensation" is widely used both by courts

and text writers to describe the measure of compensation in actions to recover damages for torts or breach of contract. See e. g. 15 Amer. Juris. 400; 17 Corp. Jur. 716. It is immaterial that the "just compensation" recoverable in actions between private parties for breach of contract may include interest, for Section 177 of the Judicial Code prohibits the allowance of interest against the United States except when expressly provided for by contract. The general jurisdictional grant in the Tucker Act is broad enough to permit interest in contract cases, but interest is denied because of the prohibition of Section 177. The grant of jurisdiction in the special jurisdictional act in this case is no broader, and is subject to the same limitation. Finally, we are here dealing with a private act, and it is a sound principle that such acts are to be strictly construed against the grantee. These acts are usually drawn by the interested parties and the rule of strict construction serves to defeat any concealed purpose of the draftsmen to accomplish an end not clearly apparent on the face of the statute. See *Tillson* v. *United States,* 100 U. S. 43, 46.

The court below allowed interest apparently on the theory that there is a history of judicial interpretation of the phrase "just compensation" in jurisdictional acts as meaning a measure of damages including interest, and that Congress was to be taken as having used the phrase in the present

jurisdictional act with this construction in mind. See R. 55–56; *Virginia Engineering Company, Inc.* v. *United States,* 89 C. Cls. 457, 471–472. But there is no such history of judicial interpretation. The cases relied on as showing such a history all involved eminent domain takings, and in eminent domain cases interest is included as required by the Fifth Amendment regardless of the phraseology of the jurisdictional act. See e. g., *Jacobs* v. *United States,* 290 U. S. 13, 17–18. Indeed the opinions in some of the eminent domain cases suggest that interest could not have been allowed under a jurisdictional act providing for "just compensation" had not the Constitution required it. See e. g., *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304; *Jacobs* v. *United States,* 290 U. S. 13, 17. And in *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, the Court of Claims itself held that a statute conferring jurisdiction to pass upon "the claim of [the plaintiff] for just compensation" for loss of property caused by the negligence of Government officers did not authorize the allowance of interest, upon the ground that (p. 278) "There was no taking of plaintiff's property by the defendant for a public use within the meaning of the Fifth Amendment."

II

The court below gave due consideration to all relevant facts and evidence in rendering its award.

The plaintiff was not entitled to recover anything more than its expenditures under the contract. The court, however, awarded plaintiff $163,865.71 in excess of its expenditures, and the award is thus more than adequate.

A. The court properly refused to give effect to plaintiff's evidence as to the rental value of the fleet. Plaintiff's claims as to rental value were preposterous on their face. In any event, plaintiff's evidence as to rental value was irrelevant to the issues before the court.

1. The evidence as to rental value was not pertinent in connection with the breach of the agreement to lease. The accepted measure of damages for loss of possession under a lease, whether the claim is founded on breach of contract or a "taking" by eminent domain, is the difference between the market rental value of the property and the rent reserved under the lease. But in the present case the lease agreement had neither value to the plaintiff nor market value, because no profit could be made from the vessels operating under the conditions of the lease. The contract specifically required plaintiff to operate as a "common carrier" for the entire period of the lease or of any renewals at "not less than the prevailing rail tariffs" (R. 16, 31). Plaintiff did not show that any net earnings could have been realized operating under those terms. Plaintiff, at all times while he was in possession, operated at a loss (Fdg. 49, R. 45). And

all of the evidence introduced by the plaintiff as to market rental value was based on the assumption that the lessees could operate free of any common carrier and rail rates restrictions.

2. Market rental value was not pertinent in connection with the plaintiff's claim for damages for breach of the contract to sell. Damages for breach of a contract to sell consist of the difference between the market value of the property and the contract price, and the same measure is applicable in this case if the contract was taken under eminent domain. And it may be assumed that rental value may be considered as evidence of market value, where market value is an issue. In this case, however, there was no occasion to take evidence to determine market value, for the reason that the purchase was to be at appraised, or market, value. And market value is now stipulated. Hence rental value was and is wholly immaterial. The plaintiff points out that similar vessels could not have been secured in the open market, and argues that rental value is the measure of the "productive value" of the fleet for the period required for reproduction. But this scarcity factor was presumably taken into consideration in appraising market value, which is now stipulated and is the same as the purchase price.

In these circumstances the purpose of the evidence of rental value could only be to establish the profits which the fleet might have earned.

Rental value is inadmissible for this purpose, however, since such prospective profits could not be recovered, whether the seizure be considered a "taking" under eminent domain, a tort, or a breach of contract. The rule against recovery of prospective profits is of particularly sound application in the case of a new and speculative business, such as that on which plaintiff embarked.

3. These reasons for rejecting evidence of rental value apply with equal force to the evidence as to the offer of the Standard Oil Company to rent the vessels. Moreover, this offer was properly excluded on other independent grounds. This court has held that offers are so lightly made in circumstances involving no responsibility on either side that they cast no light on the question of value. They are merely expressions of opinion. The offer in this case was subject to the further objection that it was made more than two years after the seizure of the fleet.

B. The plaintiff is not entitled to any additional recovery on account of the four percent interest rate in the option provision. In order to secure a loan to finance the construction of a fleet similar to that here involved, plaintiff would have had to pay a higher interest rate than the four percent reserved in the contract, and plaintiff claims that his recovery should be augmented on this account. However, the court below in making its award presumably took into consideration the favorable interest rate in the option provision.

Moreover, assuming that plaintiff was damaged to the extent of the difference between the purchase price and the discounted value of the purchase price payable in fifteen annual installments at 4 percent interest, plaintiff has not shown that the discounted value was less than the purchase price. Under the doctrine of *Chesapeake & Ohio Ry.* v. *Kelly,* 241 U. S. 485, the discounted value or "present worth" is the sum which invested at the time of the breach would have yielded the fifteen annual installments plus 4 percent as those installments became due. For the purpose of this inquiry, the *Chesapeake* case holds, the assumed rate of return on the sum so invested is the rate of return of the "best and safest investments." Plaintiff has not shown that the return on the "best and safest investments" during the period in question was greater than 4 percent, and, in the absence of such a showing, the 4 percent interest rate of the contract affords no ground for recovery by the plaintiff.

Treating the agreement as one to loan plaintiff money at 4% in order to pay for the fleet, plaintiff might according to some decisions have recovered the excess cost of negotiating another loan, if he had negotiated one, or any damage resulting from his inability to purchase the fleet. But plaintiff did not negotiate another loan and it has been shown that he suffered no loss by reason of his failure to secure the fleet at the purchase price.

C. The court below was not required to consider the rental value of the unloading apparatus. Dur-

ing the period of the lease, plaintiff's right to use this apparatus was valueless because of the restrictive provisions of the lease. The rental value of the apparatus is not material on the question of damages caused by the breach of the agreement to sell, for the same reasons discussed in connection with the sale of the fleet. Moreover, the paintiff offered to waive all claims arising under the supplemental contract (which dealt with the unloading apparatus) except those for the use of plaintiff's land and the expense of watchmen, if the Government would convey the unloading apparatus to the plaintiff and deliver possession of the property on which it was located. The Acting Secretary of War replied that the United States claimed no interest in the apparatus or the land on which it was located, and that it waived any right it might be thought to have. The plaintiff treated this release as a compliance with the terms of his offer, and accordingly he may not now advance his claim for rental value of the apparatus.

The plaintiff's claim for expense of watchmen for the unloading apparatus is without merit. There is nothing to show that plaintiff was requested or expected by the Government to incur this expense.

D. The court below allowed the plaintiff $163,-865.71 in excess of his expenditures. As we have shown, on strict principles of law the plaintiff's damage in addition to his actual expenditures was

only nominal. This award was, accordingly, too generous, but certainly plaintiff cannot object on that account.

ARGUMENT

I

THE COURT OF CLAIMS ERRED IN AWARDING INTEREST FROM THE DATE OF THE SEIZURE OF THE VESSELS

Section 177 of the Judicial Code (28 U. S. C. § 284) provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *." Accordingly, it is well settled that interest may not be recovered in a suit against the United States unless specifically provided for by contract or authorized by act of Congress.[4] Section 177 is, indeed, merely declaratory of the common law principle that interest does not run against a government in the absence of statute or contract evincing a contrary intention.[5]

[4] *Cherokee Nation* v. *United States*, 270 U. S. 476, 487; *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *Verdier*, 164 U. S. 213, 218; *Tillson* v. *United States*, 100 U. S. 43.

[5] *Boston Sand Co.* v. *United States*, 278 U. S. 41; *United States* v. *Commonwealth Line*, 278 U. S. 427; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *North Carolina*, 136 U. S. 211, 216; *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Sherman*, 98 U. S. 565, 567–568; *Smyth* v. *United States*, 302 U. S. 329, 353; *Sheckels* v. *District of Columbia*, 246 U. S. 338, 340.

An apparent exception to this rule is that in the case of a taking by eminent domain interest from the date of the taking is included in the recovery as a part of just compensation.[6] This is on the theory that the Fifth Amendment entitles the owner to the full market value of his property at the time of the taking: hence interest is included not as such but as a means of putting the condemnee in as good a position as he would have been in had he received compensation at the time of the taking.[7] "The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution." *Smyth* v. *United States,* 302 U. S. 329, 353.

The plaintiff does not contend that his contract with the United States stipulated for the payment of interest. Below he did not predicate any claim on the Fifth Amendment: here, however, he urges

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[6] *United States* v. *Rogers*, 255 U. S. 163; *United States* v. *Benedict*, 261 U. S. 294; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215; *Phelps* v. *United States*, 274 U. S. 341; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Creek Nation*, 295 U. S. 103, 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496.

[7] *United States* v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Creek Nation*, 295 U. S. 103, 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *United States* v. *Klamath Indians*, 304 U. S. 119.

that he is entitled to just compensation under the Fifth Amendment for an eminent domain taking. The plaintiff also contends, and the court below held, that the special jurisdictional act under which this suit was brought, by employing the phrase "just compensation," provides for the eminent domain measure of recovery, including interest, even if there was no eminent domain taking.

A. THE PLAINTIFF IS NOT ENTITLED TO JUST COMPENSATION UNDER THE FIFTH AMENDMENT

1. It is well settled that an unauthorized, and hence tortious, seizure, use or destruction of property by agents of the United States does not constitute a taking of property within the meaning of the Fifth Amendment, for which the United States must pay just compensation.[8] This principle is but an application of the general rule that the United States is not responsible for the unauthorized acts of its agents. See *Gibbons* v. *United States*, 8 Wall, 269, 274.

The doctrine has also been frequently enunciated by the Court that a seizure and use of property by officials under a claim of right advanced on behalf of the United States does not amount to an eminent

[8] *Hughes* v. *United States*, 230 U. S. 24, 35; *Hooe* v. *United States*, 218 U. S. 322; *Gibbons* v. *United States*, 8 Wall. 269; *United States* v. *North American Co.*, 253 U. S. 330, 333–334. Cf. *United States* v. *Lynah*, 188 U. S. 445, 465–466.

domain taking, whether the claim of right be well grounded or not.[9] While, as will be shown, the exact scope of the doctrine and its application in certain classes of cases are not entirely clear from the decisions, it plainly does apply here, and precludes any holding that there was an eminent domain taking. Decisive of the present case on this point is *Klebe* v. *United States,* 263 U. S. 188. In that case agents of the United States took possession of a steam shovel, contending that the contract for the construction project on which the shovel was being used authorized the United States to take over the shovel on the payment of a certain amount, which was tendered. The owner of the shovel had leased it to the contractor, and had agreed that it should be subject to the agreement between the contractor and the United States. The owner contended, nevertheless, that the United States was not privy to this arrangement with the contractor, and brought suit against the United States for the value of the shovel, on the theory that it had been taken for public use so that an

[9] *Klebe* v. *United States*, 263 U. S. 188; *Langford* v. *United States*, 101 U. S. 341; *Tempel* v. *United States*, 248 U. S. 121; *Pearson* v. *United States*, 267 U. S. 423; *Hill* v. *United States*, 149 U. S. 593; *Andrus* v. *United States*, 59 C. Cls. 851; *Kinkead* v. *United States*, 18 C. Cls. 504; *Jackson* v. *United States*, 27 C. Cls. 74; *Cadwalader* v. *United States*, 59 C. Cls. 533. Compare *Juragua Iron Co.* v. *United States* 212 U. S. 297; *Hijo* v. *United States*, 194 U. S. 315; *Castelo* v. *United States*, 51 C. Cls. 221.

mplied obligation to make just compensation rose. The Court held that no obligation to pay ust compensation could be implied since possession vas taken "under an asserted claim of right to do o by virtue of an express contract." 263 U. S. t 191. Whether this interpretation of the conract was sound was, the Court said, immaterial: f it was not sound the resulting wrong was ortious.[10]

The application of this case here is plain. The vessels were seized and the lease was terminated by gents of the United States under the claim that he United States was entitled to repossess the vessels and to terminate the lease by virtue of the erms of the lease agreement. See *supra*, pp. 5–6; R. 19–20, 38–39, 41, 43–44. While the Court of Claims has now held that the contract was not terminated in accordance with its provisions, and while he Government has not appealed from its decision n this respect, the undisputed fact that the Government's agents claimed to be acting under the contract inhibits any holding that there was an eminent domain taking. Further, since the seizure of the vessels by its agents was not in accordance with the contract, it was not authorized by the United States and was, as the court below held, tortious. Hence

[10] Accord: *Andrus* v. *United States*, 59 C. Cls. 851; *Cadwalader* v. *United States*, 59 C. Cls. 533. Cf. *Pearson* v. *United States*, 267 U. S. 423.

there is also brought into operation the rule that an unauthorized seizure of property by agents of the United States does not constitute an eminent domain taking.

For these reasons it is clear that the seizure of the vessels and the termination of the agreement did not constitute, at the time of the seizure and termination, an eminent domain taking, for which the United States was obligated to make just compensation under the Fifth Amendment. Indeed, the plaintiff does not so contend. But the plaintiff does contend that the initially tortious seizure was "adopted" by the United States at some subsequent date with the result that the seizure was thereby transformed into an eminent domain taking as from the beginning (Br. in Opp., p. 11). This contention requires a further exploration of the principle that assertion of a claim of right precludes an eminent domain taking.

2. The Court early held that a seizure and use of property under a claim that title to the property is in the United States does not constitute a taking. *Langford* v. *United States,* 101 U. S. 341. Accord: *Kinkead* v. *United States,* 18 C. Cls. 504; *Jackson* v. *United States,* 27 C. Cls. 74; *Cadwalader* v. *United States,* 59 C. Cls. 533. Subsequently the Court held the *Langford* decision controlling in *Hill* v. *United States,* 149 U. S. 593. In that case the Government had constructed a lighthouse on submerged land in Chesapeake Bay, asserting that

the land was subject to the paramount right of the United States to use it for navigation works. The Court held that since this claim was made there was no eminent domain taking of the land, whether the claim was sound or not. The *Hill* case was in turn followed by the Court in *Tempel* v. *United States,* 248 U. S. 121. There the Government had dredged certain submerged land, under the belief that it was part of the bed of a navigable stream in its natural state, and so was subject to the paramount right of the United States to use it for navigation, a right which had been established by the decisions after the *Hill* case. The owner of the land, asserting that it was not part of the bed of the stream in its natural state, brought suit for just compensation. The Court held that the claim by the Government that the land was in the natural bed of the stream, whether sound or not, precluded an eminent domain taking.

Intervening between the *Hill* and *Tempel* decisions the Court decided *United States* v. *Lynah,* 188 U. S. 445, and *United States* v. *Cress,* 243 U. S. 316. In those cases the Government, under authorization of Congress, constructed dams which caused the plaintiffs' lands to be inundated by backwater. In both cases the Court held that the Government had taken the lands by eminent domain, although the Government advanced a claim of right, viz., that the lands inundated were held subject to a paramount right in the United

States for use for navigation. In accord with the *Lynah* and *Cress* decisions, see *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 21; *Hurley* v. *Kincaid*, 285 U. S. 95, 104–105.

The opinions in these cases do not contain a satisfactory reconciliation of the two divergent lines of decisions. The distinction properly turns, we think, on the breadth of the congressional authorization: the inquiry is whether Congress intended that the project be carried out even if it resulted in the invasion of private property rights. Or, more realistically, whether it appears that Congress would have authorized the project even if it had foreseen the possibility that the project might invade private rights. Where it may thus be said that Congress authorized a project to proceed regardless of invasion of private rights, it may, and indeed should, be said that Congress impliedly authorized the eminent domain taking of whatever private property rights might subsequently be found by the courts to have been invaded by the project. This is but another way of saying that in such circumstances an implied promise by the United States to make just compensation may be inferred. And it is an explicit basis of decision in the leading cases on this point that Congress in authorizing the project intended that it proceed regardless of resulting invasions of private rights. See *United States* v. *Lynah*, 188 U. S. 445, 465–467, 468; *United States* v. *Great Falls Manufacturing*

Company, 112 U. S. 645, 656; *Yearsley* v. *Ross Const. Co.,* 309 U. S. 18, 20. Cf. *Hurley* v. *Kincaid,* 285 U. S. 95, 103–104.

If, on the other hand, it cannot be said that Congress, when authorizing a project, intended that it proceed regardless of resulting invasion of private rights, there is no basis for saying that Congress has impliedly authorized an eminent domain taking. This, we think, is the sound basis of the decision in the *Tempel* case. In that case there was no express congressional authorization for dredging beyond the banks of the natural stream (248 U. S. at 124) and no reason to suppose that Congress contemplated any such thing. Hence there was no basis for concluding that Congress had impliedly authorized an eminent domain taking. The *Hill* case, on the other hand, is probably irreconcilable with the view represented by the *Lynah* case, since it seems reasonably clear that Congress would e authorized the construction of the lighthouse in that case even if it had understood that the construction might infringe upon private rights of property.

The principle which we thus derive from these cases is not limited to eminent domain takings claimed to have resulted from construction works, but is equally applicable to all cases involving the use or destruction of property by federal agents under claim of right. In the *Klebe* case, for example, if Congress had, either expressly or by im-

plication, authorized the Government's agents to take the steam shovel regardless of whether the United States was entitled to take it under the contract, the taking of the shovel would, if in violation of the contract, have been an eminent domain taking. Of course, Congress does not ordinarily authorize the Government's agents to violate contracts of the United States, and it would be going far to find any such implied authorization.

Thus the broad proposition found in the cases, that a taking of property for the United States under a claim of right cannot constitute an eminent domain taking, involves the assumption that the taking is authorized by Congress only if the claim of right is well founded. On this assumption, if the claim is not well founded the taking is unauthorized and tortious, and so not by eminent domain. But if, on the other hand, Congress authorized the taking regardless of whether the claim of right were fallacious, the taking would not be tortious, and it would, if the claim were unfounded, constitute an eminent domain taking. See *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18.

Applying these principles to the present case, the fact that the seizure of the vessels was under claim of right precludes any holding that it was an eminent domain taking, unless the seizure was authorized by Congress, expressly or impliedly, even if it was in violation of the lease contract. That, of course, is not the case, and no such con-

tention has ever been made. The seizure, since the claim of right was fallacious, was merely tortious, and grounds no claim for just compensation under the Constitution.

3. We turn then to the plaintiff's contention that the tortious seizure was "adopted" by the United States at some subsequent date, with the result that the seizure was thereby transformed into an eminent domain taking as from the beginning (Br. in Opp., p. 11). In support of this contention the plaintiff points to the findings of the Court of Claims that the vessels were seized "for the use and benefit of the United States" (R. 41), and that the United States has retained possession of the vessels and caused them to be operated as part of its barge service (R. 44). These findings do not, according either to precedent or principle, establish implied congressional ratification of the seizure.

In two Indian claims cases, but, so far as we have found, no other case, this Court held that the United States had tacitly ratified a mistaken or otherwise unauthorized seizure of property by its agents, and that the seizure was transformed by the ratification into an eminent domain taking as from the beginning, with the result that the United States was liable for interest as a part of just compensation from the time of the seizure. These cases are *United States* v. *Creek Nation,* 295 U. S. 103, and *Shoshone Tribe* v. *United States,* 299 U. S.

476. In the former case the Creek Nation ceded to the United States a portion of its lands, and later the United States assigned to the Sac and Fox Indians a part of the ceded lands which adjoined lands retained by the Creek Nation. In 1872, a government surveyor, in surveying the line between the Creek lands and the Sac and Fox lands, erroneously included certain lands of the Creeks in the Sac and Fox tract, with the result that the Sac and Fox Indians occupied them. Thereafter, by an agreement ratified by an Act of 1891, the Sac and Fox agreed to accept allotments in severalty, and that their remaining lands should be sold to settlers and the proceeds turned into the treasury as public money. In carrying out this Act the erroneous survey of 1872 was followed, and as a result the United States patented certain of the Creek lands erroneously included in the Sac and Fox tract to Sac and Fox Indians and sold most of the remainder of these Creek lands to settlers. Subsequently a government resurvey of the Creek boundary revealed the error in the 1872 survey, and thereafter the right of the Creeks to the lands was repeatedly recognized by Secretaries of the Interior and other officials in reports to Congress. Nevertheless, the Creeks were never restored to possession.

On these facts this Court held that the United States had confirmed the disposals of the Creek lands under the Act of 1891, so that the matter

stood just as if the United States had taken the lands by eminent domain at the time of those disposals. Accordingly, the Court held that the Creek Nation should recover the value of the lands at the times of the disposals, plus interest from those times. In holding that the United States had ratified the disposals, the Court said (295 U. S. at 110–111):

> True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.
>
> We conclude that the lands were appropriated by the United States in circumstances which involved an implied under-

> taking by it to make just compensation to the tribe.[11]

Shoshone Tribe v. *United States,* 299 U. S. 476, is very like the *Creek* case on its facts. In 1878 the Commissioner of Indian Affairs settled a tribe of Arapahoe Indians on the reservation of the Shoshones. The Commissioner acted, initially at least, under the mistaken impression, stemming from his misapprehension of a subordinate's report, that the Shoshones had consented to receive the Arapahoes. But even after the Commissioner had been informed of his mistake he took no step to remove the Arapahoes, and in the years that followed succeeding Commissioners treated the two tribes as equal beneficiaries of the reservation, and they were eventually so treated in acts of Congress providing for cessions and for allotments in severalty of reservation lands.

In arguing the case the Government conceded that the settlement of the Arapahoes on the Shoshone reservation in 1878 was a violation of the rights of the Shoshones, and in its opinion the Court said (299 U. S. at 494):

> The treaty of 1868 charged the Government with a duty to see to it that strangers

[11] Earlier in the opinion, in another connection the Court referred to "matters reflecting a confirmation of the acts of the administrative officers, such as the receipt by the United States of direct and material benefits from their acts and its retention of the benefits with knowledge of all the facts." 295 U. S. 103, 108.

> should never be permitted without the consent of the Shoshones to settle upon or reside in the Wind River Reservation. That duty was not fulfilled.

The Government contested the right to interest, however, on the ground that the jurisdictional act operated as an offer to the tribe by the United States to purchase a one-half interest in their lands as of the date of the appropriation, that the tribe accepted the offer by bringing suit under the jurisdictional act, and that the liability of the United States to the tribe was therefore contractual and not for just compensation under the Fifth Amendment. See 299 U. S. at 483. The Court did not notice this argument in its opinion; on the question of interest it merely repeated the doctrine of the *Creek* case that since the taking, though tortious in origin, was made lawful by relation, there was an appropriation within the Fifth Amendment for which the Government must pay just compensation.

As stated, so far as we have found the *Creek* and *Shoshone* cases are the only ones in which this Court has held that a mistaken seizure of property had been tacitly ratified by the United States so as to transform it into an eminent domain taking. *Crozier* v. *Krupp,* 224 U. S. 290, cited by plaintiff (Br. in Opp., p. 11), deals with an express, though blanket, statutory ratification, not with implied ratification. See 224 U. S. at 305, 307.

4. The holdings of this Court in the *Creek* and *Shoshone* cases that the United States had impliedly ratified the mistaken seizures were rested on two factors: first, that the United States was under a duty to protect the rights of its Indian wards, and, second, that Congress had determined to permit the disposals of the Indian lands to stand, regardless of whether they were violative of the rights of the Indians.

Both of these elements, the first as well as the second, are, we submit, essential to comprise any such implied ratification. This Court has several times held that the United States does not become liable for unauthorized acts of its agents merely because it retains the benefits of those acts. *Hooe* v. *United States,* 218 U. S. 322, 333–334; *Filor* v. *United States,* 9 Wall. 45, 49; *Hijo* v. *United States,* 194 U. S. 315, 323. In the first cited of these cases the Court pointed out that to hold otherwise would indirectly endow the agent with powers which had not been accorded him by Congress. 218 U. S. at 333–334.

It is no answer to say that the United States may reject benefits ensuing from unauthorized acts of its agents. It cannot reasonably be expected that Congress will remain constantly on the alert to repudiate any advantage to the United States so gained. The United States is under no legal duty to protect ordinary citizens, fully capable of obtaining redress in the courts, from illegal and unauthor-

ized acts of Government officials. The United States "does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." Story on Agencies, § 319, quoted with approval in *Gibbons* v. *United States,* 8 Wall. 269, 274.

The United States is, however, in a different position as respects the Indian tribes, which are its wards. As held in the *Creek* case, quoted *supra* p. 39, they are entitled to rely on the United States for protection, whether against the United States' own agents or against outsiders. As to such tribes the United States is under a duty to remain alert to check overreaching by its officials, and a failure to remedy such overreaching when brought to the attention of Congress may reasonably be regarded as authorization for the act of the official *ab initio.* But this duty, and consequently this basis for finding an implied ratification, exists only with respect to Indian tribes, because of their special status.

5. Even if the doctrine of appropriation *ab initio* by implied ratification is not thus limited, as we have suggested, to wrongs to Indian tribes, it plainly has no application here. We have shown that in order for a seizure of property under a claim of right to constitute an eminent domain taking, it must appear not only that the claim of

right was unsound, but that the seizure was authorized by Congress, expressly or impliedly, even though the claim of right should prove to be ill-founded. And subsequent congressional action, to transform into an eminent domain taking a seizure which initially lacked such authorization, would have to involve congressional approval of the seizure in disregard of whether the claim of right on which it was based was well-founded. For congressional approval of the seizure only if it were rightful would be supererogatory and would not supply the necessary congressional approval of the action in the contingency that the claim of right were ill-founded.

For example, the taking of possession of property by agents of the United States under a claim that title to the property was in the United States would not, without more, constitute an eminent domain taking, even if the claim of title were unsound. *Langford* v. *United States,* 101 U. S. 341. And for subsequent congressional approval of the seizure to supply this element of authorization, it would have to be congressional approval regardless of the validity of the claim.

The subsequent congressional approval in the *Shoshone* case met this test. There Congress chose to treat as rightful the Arapahoe occupation of the Shoshone reservation, although it knew that the Shoshones claimed that it was violative of their

rights. And the subsequent congressional approval in the *Creek* case went considerably beyond that. For while the original seizure of the Creek lands had been under claim of title for the United States, that claim had been wholly abandoned, and its mistaken character had been fully acknowledged by the competent executive authorities, and it was with these facts before it that Congress impliedly approved the continued possession of the Creek lands by the grantees of the United States. In the *Creek* case Congress thus approved the seizure not merely regardless of whether the title of the United States was good but with definite knowledge that it was not.

6. In the present case there has been no such congressional approval of the seizure of the vessels and of the abrogation of the plaintiff's rights under the lease. While the vessels have been used for the benefit of the United States since the seizure, appellees have made no attempt to show that Congress even had any nowledge of the circumstances of their use or of the controversy between Goltra and the United States before the jurisdictional bills came before it.

The jurisdictional act under which this suit was brought does not purport to ratify a wrongful seizure. The Act, it is true, speaks of property "taken, whether tortiously or not, * * * by the United States under orders of the Acting Sec-

retary of War, for the use and benefit of the United States * * *." But the words "whether tortiously or not" constitute a recognition that the seizure may have been unauthorized. It was so found below. If the question of the construction of the jurisdictional act be deemed a doubtful one, however, the principle (discussed *infra*) that private acts should be strictly construed suggests that any claim of ratification based on the statute should be rejected. And the legislative history plainly shows that Congress did not intend to ratify a wrongful seizure, but only to give the plaintiff "a day in court." When this case was before this Court in *Goltra* v. *Weeks,* 271 U. S. 536, on the plaintiff's suit for an injunction against seizure, the Court decided it against the plaintiff upon the assumption that the Chief of Engineers had exercised his judgment in good faith in terminating the contract for noncompliance. That issue had not, however, been litigated in the district court, and the plaintiff claimed (as the court below eventually held in the present suit) that the Chief of Engineers had not exercised his judgment in good faith. Subsequently, when the plaintiff sought to litigate that issue it was held to be barred by the decision of this Court. *Goltra* v. *Davis,* 29 F. (2d) 257 C. C. A. 8th), certiorari denied, 279 U. S. 843. Upon the basis of these facts the congressional committees recommended that the jurisdictional bill be passed solely to give the plaintiff his day in court upon this issue. For

this purpose it waived the bar of any statute of limitations or previous decisions. See House Report No. 828, 73d Cong., 2d Sess.; Senate Report No. 362, 73d Cong., 2d Sess. Nothing in this history suggests any purpose to ratify an unauthorized seizure.

Ultimately the only possible basis for inferring congressional approval of the seizure and of the abrogation of the plaintiff's rights under the contract is that Congress enacted the jurisdictional act, instead of providing that if the plaintiff's claim were ultimately upheld in the courts the vessels should be restored and a new lease tendered. The old lease has long expired and the vessels have undoubtedly deterioriated; in any event the suggestion could not be entertained that Congress approved the seizure, even if wrongful, merely because it omitted to proffer relief in kind. That would transform into an eminent domain taking almost any wrong for which Congress afforded relief.

B. THE JURISDICTIONAL ACT DOES NOT PROVIDE FOR AN AWARD OF INTEREST AGAINST THE UNITED STATES

The special jurisdictional act under which this suit was brought (set out *infra*, p. 83) confers jurisdiction upon the Court of Claims to "render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken,

whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: * * *"

The plaintiff contends that this act, by employing the words "just compensation," provides for the eminent domain measure of recovery, including interest, even if there was no eminent domain taking. And apparently it was on that theory that the court below included interest in its judgment. See R. 55–56.

In the first place, it is probable that the words "just compensation" in the act are simply Goltra's own description of his claims, and not a measure of recovery at all. The act, that is to say, describes Goltra's claims as for "just compensation to him" for the vessels and merely empowers the court below to "render judgment on the claims," without attempting to prescribe any rule for measuring Goltra's recovery, in the event that he should prevail. Nothing in the legislative history of the act indicates that it was the intent of Congress to prescribe any particular rule of damages, or that Congress ever gave any consideration to that question at all. The judiciary committees of both Houses concluded that the merits of Goltra's claims had never been passed upon, and stated that the sole purpose of the act was to give him his "day in

court." House Report 828, 73d Cong., 2d Sess.; Senate Report 362, 73d Cong., 2d Sess.; House Report 1426, 72d Cong., 1st Sess. In this absence of any evidence of any congressional intention to put Goltra in the preferred position of one whose property has been taken by eminent domain, it is unlikely that Congress meant to do more than give Goltra the same standing in the Court of Claims as any other claimant. The facts of the case do not disclose any reason which Congress might have wished to give Goltra special preference.

If, however, the jurisdictional act does use "just compensation" to describe Goltra's recovery, there is no reason to suppose that Congress used the words in their technical eminent domain sense as an indirect way of providing interest. The words "just compensation" are not words of art commonly importing an obligation to pay interest. The provision of the Fifth Amendment that private property shall not be taken for public use without "just compensation" is construed as requiring the inclusion of interest from the date of the taking in eminent domain cases. But even as used in the Amendment "just compensation" does not refer solely to the eminent domain measure of damages. It is also used to describe the right of a utility to a reasonable rate of return on the fair value of its property. See *West* v. *Chesapeake & Potomac Tel. Co.,* 295 U. S. 662, 671. And

"just compensation" is widely used both by the courts and by text writers to describe the measure of compensation in actions to recover damages for torts or breach of contract.[12] If Congress did use the words as descriptive of recovery, it used them presumably to refer to the measure of recovery appropriate to any claims which might be proved, including one for breach of contract or tort.

It is immaterial that the "just compensation" recoverable in actions between private parties for breach of contract may include interest in the discretion of the court. Section 177 of the Judicial Code prohibits the allowance of interest against the United States save as expressly provided for by contract. The general grant in the Tucker Act of jurisdiction "of all claims * * * founded * * * upon any contract, express or implied, with the Government of the United States, or for

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[12] See e. g., *Hetzel* v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26, 37; *Torkomian* v. *Russell*, 90 Conn. 481, 485, 97 Atl. 760; *Howey* v. *New England Nav. Co.*, 83 Conn. 278, 76 Atl. 469; *Tulley* v. *Tranor*, 53 Cal. 274, 280; Sutherland, *Damages* (3d ed. 1903), p. 36 *et seq.*

"The fundamental principle of the law of damages is that one injured by a breach of a contract or by a wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained." 15 Amer. Juris. 400.

"The primary object of an award of damages in a civil action, and the theory upon which it is based, is just compensation or indemnity for the loss or injury sustained by the complainant." 17 Corp. Jur. 716.

damages * * * in respect to which claims the party would be entitled to redress * * * if the United States were suable, * * *" is broad enough in terms to include interest where interest is recoverable in contract cases. Interest is denied, not because of any limitation in the general jurisdictional grant, but because of the prohibition of Section 177. The grant of jurisdiction in the special act here involved, which is certainly no broader than that contained in the Tucker Act, is subject to the same limitation.

Finally, we think it decisive of this phase of the case that we are here dealing with a private act passed for the particular benefit of a single individual. It is a sound and well-established principle that such acts are to be strictly construed against the grantee.[13] Such acts are usually drafted by the interested parties, and the rule of strict construction serves to defeat any purpose of the draftsmen, concealed by the skillful use of terms, to accomplish an end not clearly apparent on the face

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[13] See Endlich, *Interpretation of Statutes* (1888) §§ 304, 505; Sutherland, *Statutory Construction* (1891) § 199; Black, *Interpretation of Laws* (1896) § 315 *et seq.* See also *Russell* v. *Sebastian*, 233 U. S. 195, 205; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 562; *Slidell* v. *Grand Jean*, 111 U. S. 412, 438; *Dubuque & Pacific R. R. Co.* v. *Litchfield*, 23 How. 66, 88; *Raleigh & G. R. R. Co.* v. *Reid*, 64 N. C. 155, 158; *Altrinchain Union* v. *Cheshire Lines Committee*, L. R. 15 Q. B. D. 597, 603. Cf. *United States* v. *Cumming*, 130 U. S. 452.

of the statute. Thus in *Tillson* v. *United States,* 100 U. S. 43, the Court, speaking through Chief Justice Waite, said (p. 46):

> We have no doubt it was the wish of those who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for that court to give a judgment against the United States at least for interest * * *. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power.[14]

This rule of strict construction finds further support here in the presumption against implied repeal, for this case, of the general provisions of Section 177 of the Judicial Code prohibiting the

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[14] The special act in the *Tillson* case authorized the court to investigate the claim and "ascertain, determine, and adjudge the amount equitably due * * *." In *Boston Sand Co.* v. *United States*, 278 U. S. 41, 46, a special act empowered the court to adjudicate a collision case and to decree "for the amount of the legal damages * * * upon the same principle and measure of liability with costs as in like cases * * * between private parties." This language was held not to allow interest against the United States, although as between private parties it would have been recoverable. See also *United States* v. *Commonwealth Line*, 278 U. S. 427; *Nantasket Beach Steamboat Co.* v. *United States*, 297 Fed. 656 (D. Mass.); *Pennell* v. *United States*, 162 Fed. 75 (D. Me.).

allowance of interest by the Court of Claims. Cf. *Tillson* v. *United States*, 100 U. S. 43, 47.

The court below did not explain its award of interest in this case except by stating that it was awarded "not as interest but as a part of just compensation" and by citing its decision in *Virginia Engineering Company, Inc.* v. *United States*, 89 C. Cls. 457. In the *Virginia Engineering* case a statute authorizing the Court of Claims to determine the plaintiff's claim "and to award just compensation" for extra costs incurred at the request of a Government officer in the performance of a contract was held to require the allowance of interest. The court recognized that the plaintiff would only be entitled to the actual loss sustained in the absence of a special statutory provision but concluded (pp. 471–472) that the term "just compensation" entitled the claimant to the recovery of interest. The court said that Congress had employed the words "just compensation" in many other statutes, and that in every instance the courts had construed them as allowing the recovery of interest. Accordingly, the court held, Congress was to be taken as having used the words with this construction in mind.

There is no history of judicial interpretation of the phrase "just compensation" in jurisdictional acts as meaning a measure of damages including interest, in other than eminent-domain cases. In eminent-domain cases the phraseology of the juris-

dictional act is of course immaterial: interest is included as required by the Fifth Amendment even if the suit is brought under the Tucker Act, which prohibits interest, or under a special jurisdictional act which contains no mention either of interest or of just compensation. See e. g. *Jacobs* v. *United States,* 290 U. S. 13, 17–18; *United States* v. *Creek Nation,* 295 U. S. 103, 105, 111–112; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 484–485, 496–497; *Waite* v. *United States,* 282 U. S. 508.[15] And aside from eminent-domain cases neither the court below in the *Virginia Engineering* case nor appellees in their brief in opposition cite any case construing the words "just compensation" in a jurisdictional act as providing for the recovery of interest.

On the contrary, every case cited by appellees or by the court below in the *Virginia Engineering* opinion arose under one or another of the statutes enacted during the World War to provide for the exercise of the federal eminent-domain power in connection with the national war effort. These statutes authorized the President to requisition property for war needs, and to modify, suspend, cancel or requisition contracts of certain types, directed him to pay "just compensation" therefor, and provided that the United States might be sued for any balance necessary to make up "just com-

[15] That the *Waite* case involved an eminent-domain taking, see *Crozier* v. *Krupp*, 224 U. S. 290, 304–305, and *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 22.

pensation." The opinions of this Court allowing interest against the United States in suits for takings of property under these statutes rest, clearly and explicitly, on the Fifth Amendment, not on the provisions in the acts for "just compensation."[16] So much so that they suggest that interest would not have been allowed had the right to it depended on the statutes. Certainly the Court did not treat the phrase "just compensation" as equivalent to a provision for interest. In the leading case, *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304, it said:

> Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * *

And in *Jacobs* v. *United States,* 290 U. S. 13, 17, in describing the *Seaboard* decision, the Court said:

> That suit was brought by the owner under § 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court

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[16] Under these statutes the cancellation by the United States of a contract to which it was a party was held to be not a breach of contract but an eminent-domain taking. See *Russell Co.* v. *United States,* 261 U. S. 514, 523.

> held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate. * * *

Not only is the statement of the court below in the *Virginia Engineering* case, that "just compensation" had come to have a well understood meaning in jurisdictional acts as permitting the recovery of interest, thus wholly without affirmative support in the cases, but it is strikingly refuted by the decision of the court below itself in *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, decided about six months before the *Virginia Engineering* case. In the *Squaw Island* case the Court of Claims held that a statute conferring jurisdiction to pass upon "the claim of [the plaintiff] for just compensation" for loss of property caused by the negligence of Government officers did not authorize the allowance of interest, upon the ground (p. 278) that "There was no taking of plaintiff's property by the defendant for a public use within the meaning of the Fifth Amendment."

II

The Court of Claims Gave Due Consideration to All Relevant Facts and Evidence in Rendering Its Award

The Court of Claims found that "Taking the amount of the counterclaims and all the relevant

facts and circumstances, including the expenses of plaintiff, into consideration, the value for the lease, option to purchase, and all legal and equitable claims * * * is $350,000" (Fdg. 56, R. 49, R. 55). This sum, the court stated, constituted "a jury award" after "Taking all the relevant facts into consideration" (R. 55). The plaintiff's expenses under the contract, as found by the court, totaled $193,736.99,[17] and the Government's counterclaims amounted to $7,602.70 (Fdgs. 54 and 55, R. 47–49). The balance of the award, $163,865.71,[18] presumably represents a "jury" estimate of the

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[17] The court did not itself total the items of expense, but found individually the following expenses:

Installation of oil burner for "Illinois" (Fdg. 43, R. 45)	$6,414.28	
Repairs for "Illinois" (Fdg. 43, R. 45)	1,027.23	
Repairs for "Illinois" (Fdg. 43, R. 45)	732.11	
Coal burner for "Minnesota" (Fdg. 45, R. 45)	7,140.89	
Supplies of plaintiff on "Illinois" (Fdg. 46, R. 45)	5,038.44	
Replacements by plaintiff (Fdg. 47, R. 45)	79,474.52	
Insurance (Fdg. 48, R. 45)	21,017.73	
Insurance (Fdg. 48, R. 45)	30,830.30	
Construction of runways (Fdg. 50, R. 45–46)	36,061.49	
Reasonable rental value of land provided for runways and loading facilities (Fdg. 51, R. 46)	6,000.00	
Total		$193,736.99

[18] The computation is as follows:

Amount of award	$350,000.00	
Government's counterclaim	7,602.70	
Total recovery by plaintiffs		$357,602.70
Less plaintiff's expenses		193,736.99
Amount of award in excess of expenses		$163,865.71

"value for the lease, option to purchase, and all legal and equitable claims."

On his cross-appeal (No. 192), the plaintiff chiefly contends that the court below erred in arriving at its award (1) in failing to consider the rental value of the fleet and (2) in failing to give sufficient account to the difference between the interest rate payable under the contract on the unpaid balance of the purchase price and the interest rate which the plaintiff would have had to pay to secure a loan to purchase a similar fleet at the price fixed by the contract.

Under the contract, the plaintiff was entitled to possession of the fleet for the duration of the lease and had an option to purchase the fleet for an amount equal to the original cost of the vessels, i. e. $3,590,000, which option the plaintiff attempted to exercise. And the contract permitted the plaintiff to pay for the fleet out of earnings under the lease, the balance due, if any, to be paid in fifteen equal annual installments with interest at 4%. The plaintiff contends, and it is not controverted, that at the time of the seizure it would have been impossible to procure a fleet of similar barges in the open market, that such vessels could not have been built in less than two years, and that, if a loan had been negotiated for a sum sufficient to finance construction of similar vessels, the borrower would have been required to pay interest at a rate in excess of 6%. Finally,

according to the plaintiff's evidence (controverted by that of the Government), the fleet could have been leased by plaintiff at a net rental in excess of $1,100,000 annually. On this basis the plaintiff calculates that the rental value of the fleet for the unexpired period of the five year lease exceeded the cost or purchase price of the vessels by $750,000; that the "productive value" of the fleet merely for the period which would have been required to reproduce the fleet was more than $2,800,000; and that the total rental value of the fleet for fifteen years, a period less than its remaining life, was almost $14,000,000 in excess of the purchase price. And the plaintiff contends that under established principles governing the measure of just compensation and the provisions of the contract, the court should have considered this "productive" or rental value of the fleet, and also the favorable interest rate, in making its award for the taking of the lease and option to purchase.

The plaintiff makes a similar claim with respect to the unloading apparatus constructed by the Government on plaintiff's land pursuant to the supplemental contract. Plaintiff also contends that the court erroneously failed to consider the sums paid by plaintiff since July 1926 for watchmen to care for the unloading apparatus left on plaintiff's land after the seizure.

Each of these contentions is without substance. The plaintiff was not entitled to recover anything more than his expenditures under the contract. Moreover, while the court stated that it did not consider plaintiff's evidence of rental value, it did award the plaintiff more than $160,000 in excess of his expenditures, and this award presumably embraced consideration of the other claims which the plaintiff is asserting here.

A. THE COURT WAS WARRANTED IN REFUSING TO GIVE EFFECT TO PLAINTIFFS EVIDENCE AS TO THE RENTAL VALUE OF THE FLEET

The plaintiff's evidence of rental value (R. 67–72) consisted of expert opinions and of an offer to rent made by the Standard Oil Company some two years after the seizure of the vessels. (This offer is separately discussed, *infra*.) The court below made no finding as to rental value, and in its opinion it disposed of it as follows (R. 54):

> It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions cannot be sustained. [Citing cases.]
>
> There were no other towboats and barges on the Mississippi River at that time which could have been rented. There was no market value for the lease and option to purchase. * * *

Thus it may be that the court refused to consider rental value because no persuasive or credible evidence of rental value had been introduced. Certainly the extreme character of plaintiff's evidence as to rental value was itself sufficient reason to ignore it. In *The Conqueror,* 166 U. S. 110, 134, this Court observed:

> The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her expenses, for which a separate allowance was made, is putting a strain upon our credulity which we find ourselves quite unable to bear.

But however this may be, and assuming that credible evidence of rental value was before the lower court, the evidence was still, as a matter of law, wholly irrelevant to the issues before the court. The plaintiff's contention that the court should have considered his evidence of rental value may be discussed in two connections; first, in relation to the damage alleged to have been caused by breach of the agreement to lease, and secondly, in relation to damages claimed for breach of the agreement to sell the fleet at plaintiff's option.

1. *The plaintiff's evidence of rental value was not pertinent in connection with the breach of the agreement to lease.*—The accepted measure of damages or "just compensation" for loss of possession under a lease is the difference between the market

rental value of the property and the rent reserved, and this is so whether the claim is founded on breach of contract or a taking under eminent domain.[19] In this case, however, no specific rent was reserved. The plaintiff was required to pay over all net earnings to the Secretary of War for deposit in a special account (R. 17-18, 31). The contract, it is true, permitted plaintiff to apply its net earnings as lessee to the payment of the purchase price of the fleet (R. 18–19, 31), and it may be assumed for purposes of argument that any sum which could have been earned under the lease should be credited to the plaintiff as damages for breach of the lease. But no evidence was introduced to prove that a profit could have been earned operating under the conditions of the lease, and it is reasonably clear that no such showing could have been made.

The agreement specifically required the plaintiff to "operate as a common carrier" for the entire period of the lease and of any renewals, and at rates "not less than the prevailing rail tariffs without the consent of the Secretary of War" (R. 16, 31). The Secretary was authorized to permit the plaintiff to relax both the common-carrier and the rates requirement, but was certainly not required to do so (R. 16, 31). In fact, the Secretary never

[19] Tiffany, *Landlord and Tenant* (1910), sec. 67; Sedgwick, *Damages* (9th ed. 1912), sec. 984; McCormick on Damages (1935) 532–533; *Phelps* v. *United States*, 274 U. S. 341; *Des Moines Wet Wash Laundry* v. *City of Des Moines*, 197 Iowa 1082, 198 N. W. 486.

relaxed the common-carrier requirement. Moreover, the Secretary ultimately refused to permit plaintiff to charge less than rail rates save for a limited class of commodities not carried in competition with other Government-owned barges on the Mississippi River system (Fdgs. 8–10, R. 31–34). These restrictions may not be disregarded in valuing the lease. *North Coast R. Co.* v. *A. A. Kraft Co.*, 63 Wash. 250, 115 Pac. 97; cf. *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189.

Plaintiff did not and presumably could not show that any net earnings would have been realized operating under these restrictions. During the period of approximately three years that the plaintiff was in possession of the fleet (Fdgs. 34, 39, 40, R. 42, 44), he operated at a loss (Fdg. 49, R. 45). The loss was due in large part to unfavorable weather conditions (Fdg. 35, R. 42), to the necessity of making substantial expenditures in starting a new business, and to the uncertainty caused by litigation arising out of the seizure of the fleet, but it was also caused, as the court below observed, by the prohibition against charging less than rail rates (R. 54).[20] It is thus quite apparent that the lease agreement was without value to the

[20] In his brief filed with this Court in *Goltra* v. *Weeks*, 271 U. S. 536, the plaintiff asserted that shippers would not use barge service at the same rates charged by rail carriers, and that this was understood by the parties when the contract was entered into (Brief of Petitioner, at pp. 84–85).

plaintiff, for the reason that he could not earn a profit on his operation of the vessels under it.

The plaintiff's evidence as to rental value had no tendency to show that the plantiff could have made profits on the operation of the fleet, and was therefore utterly irrelevant, for the reason that it presupposed that the plaintiff's hypothetical lessees could operate the vessels free of any restrictions as to rates or as to common carrier service. The testimony as to the offer of the Standard Oil Company shows clearly that the Company contemplated operating the vesels for its own use (R. 67). The other evidence as to rental value, i. e., expert opinion, contains no reference to the common carrier and railroad rate restrictions and was likewise undoubtedly based on the assumption that the plaintiff's lessees would operate as private carriers for their own use or as private contract carriers without any restrictions as to rates or class of service.

It is unnecessary to press the point further. For, as we understand the plaintiff's argument, no contention is made that the hypothetical annual rental of more than $1,100,000, or any sum at all, could have been earned under the rail rate and common carrier requirements of the lease. Rather the plaintiff's theory appears to be that if his option to buy the fleet had been honored he, as purchaser of the fleet, could have leased it free from the common carrier and rail rate restrictions, that on this basis the earnings of the fleet would have been more

than sufficient to pay the purchase price in the manner provided by the contract together with interest at 4%, and that the court below should therefore have considered the rental value of the vessels, either for the period required to reproduce a similar fleet, or for the duration of the first five-year term of the lease, or indeed for the entire remaining life of the vessels. In brief, plaintiff's fundamental position is that rental value should have been considered in determining the damage caused by breach of plaintiff's option to purchase. To this contention we now turn.

2. *There was no occasion to consider rental value in connection with the breach of the option to buy.*—Even assuming, as the plaintiff assumes, that the common carrier and rail rate restrictions would have been removed as soon as the plaintiff opted to buy, and before payment of the entire purchase price,[21] the court below was correct in excluding rental value from consideration in fixing the value of the option to purchase.

It is elementary that the measure of damages for breach of a contract to sell is the difference between the market value of the property contracted for and the contract price. *Harten* v. *Loffler,* 212 U. S.

[21] This construction of the contract may be too favorable to plaintiff, since under it plaintiff could have avoided the restrictions of the lease and his obligation of maintenance at any time by electing to purchase, even though the Government expressly reserved title until all payments were completed (R. 18).

397; *Telfener* v. *Russ,* 145 U. S. 522; *Rochester Lantern Co.* v. *The Stiles and Parker Press Co.,* 135 N. Y. 209, 31 N. E. 1018. And in this case the same measure is applicable even though it be assumed that the contract was taken under eminent domain. The measure of recovery on this assumption is the amount which could have been secured for an assignment of the agreement (*De Laval Co.* v. *United States,* 284 U. S. 61, 71–72), ~~and~~ where, as here, the purchaser has a right to secure delivery of the vessels on the date of the "taking," the assignment value is the difference between the purchase price and the market value. And it may be assumed that rental value may be considered as evidence of market value where there is occasion to determine market value, as where the difference, if any, between the market value and the purchase price is an issue of fact which must be determined by evidence. In this case, however, there was no occasion to determine market value, for the reason that under the provisions of the contract and the stipulated facts, the market value and the purchase price of the fleet are identical. The purchase was to be at market value; hence there was no possible damage from the breach of the contract to sell, and no occasion to determine market value. *Koch* v. *Godshaw,* 75 Ky. 318; *Wire* v. *Foster,* 62 Iowa 114, 17 N. W. 174.

The contract contained the following provisions for computing the purchase price if the plaintiff

opted to purchase: (1) if the net earnings under the lease equalled or exceeded the original cost of the vessels, the earnings were to be applied to payment in full, and excess to be returned to plaintiff (Par. 5 (a)); (2) if the earnings were less than the original cost but in excess of the appraised value as determined by appraisers appointed by the parties, the earnings were to be applied to payment in full, the Government to retain any sum in excess of the appraised value (Par. 5 (b)); (3) but if the earnings were less than appraised value, the plaintiff was required to pay the full appraised value (Par. 5 (c)). Thus, if the earnings were equal to or in excess of appraised value or cost, plaintiff was entitled to purchase the fleet for cost or appraised value, whichever was less, but if the earnings were less than either cost or appraised value, the plaintiff was obligated to pay the full appraised value.

No provision was made permitting plaintiff to pay only cost if the cost were less than appraised value and the net earnings were less than either. The Government may have considered that the principal purpose of the contract from its standpoint was to secure a demonstration of the feasibility of common carrier operations on the inland waterways and, in the event that object was attained, been willing to dispose of the fleet at cost or appraised value whichever was less, but may have been unwilling to sell the property to plaintiff (or to any private or contract carrier) for less

than full commercial value if the demonstration purpose failed of achievement. Or the parties may have assumed that in the event the operations were unsuccessful, the property would be of less value than its cost.

At all events, the plaintiff, like the Government, apparently construes the contract to require payment of the full appraised value where the earnings were less than cost or appraised value, regardless of whether the latter was in excess of the cost. For the plaintiff has not urged that the appraised value at the time of the breach was greater than the original cost. To the contrary, in the court below the plaintiff requested a finding and on this appeal the parties have stipulated that the value of the vessels during the period from 1922 to 1924, when plaintiff attempted to exercise its option, "was approximately the same as the original cost thereof" (R. 67, 59).[22]

Since the contract required plaintiff to pay the appraised value of the fleet if cost and appraised value were the same, the market value and the purchase price of the vessels were identical: there can be no question but that "appraised value" and

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[22] In view of the stipulation the evidence on which this requested finding was based was not included in the record on this appeal, but it seems fair to say that the evidence was introduced by plaintiff. The plaintiff's purpose of course, was to establish the purchase price to be deducted from the value of the fleet in fixing the amount of the award for the seizure of the vessels.

"market value" are one and the same. In these circumstances, the market value of the vessels, and hence estimated rental value to show market value were obviously immaterial. Since purchase was to be at market value, there was neither damage from breach of the contract to sell, nor occasion to determine market value. The latter conclusion may also be reached somewhat differently: it is stipulated that market value was the same as original cost, i. e., $3,590,000; hence the refusal of the court below to consider rental value to establish market value is now academic.

The plaintiff points out that vessels of the type in question could not have been secured on the open market (R. 67), and argues that rental value should have been considered as a measure of the "productive value" of the fleet for the period required for construction of similar vessels. The short answer is that the scarcity factor was one element to be considered in appraising the market value of the fleet at the time plaintiff elected to purchase, and presumably was taken into consideration in plaintiff's requested finding of fact, now stipulated, that the value of the fleet during the years 1922 to 1924 was the same as its original cost.

Since evidence of rental value is thus irrelevant on the question of the value of the fleet, in view of the fact that the market value and purchase price of the fleet were identical, there remains only the question whether such evidence is admissible to

establish the prospective profits of the enterprise. Evidence of rental value is inadmissible for this purpose, however, since prospective profits cannot be recovered. If, as the plaintiff contends, the seizure of the vessels constituted a taking under eminent domain, no award can be made for the profits which could have been earned by operating the fleet. *Mitchell* v. *United States,* 267 U. S. 341; *Joslin Co.* v. *Providence,* 262 U. S. 668; *Bothwell* v. *United States,* 254 U. S. 231. Such is the rule where tangible property is condemned, and the measure of damages certainly cannot be more liberal where the condemnee has only a contract to purchase the property. In neither case is there a "taking" of the profits. Cf. *United States* v. *Carver,* 278 U. S. 294, at 299–300; *Omnia Co.* v. *United States,* 261 U. S. 502, 510. The case of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, relied on by the plaintiff, is not in point, since the property there taken included a franchise of a going concern as well as physical property.

If, on the other hand, as the Government contends, the seizure constituted a breach of contract or tort, the conclusion is the same. In an action for breach of contract to sell property, the profits of the business for which the property was intended are deemed speculative and remote, particularly in the case of a new business, and cannot be recovered even though the intended use was known to the defendant. *Howard* v. *Stillwell &*

Bierce Mfg. Co., 139 U. S. 199; *United States* v. *Behan*, 110 U. S. 338; *De Ford* v. *Maryland Steel Co.*, 113 Fed. 72 (C. C. A. 4th); *E. W. Bliss Co.* v. *Buffalo Tin Can Co.*, 131 Fed. 51 (C. C. A. 2d); *Cramer* v. *Grand Rapids Show Case Co.*, 223 N. Y. 63, 119 N. E. 227.[23]

The present case demonstrates the wisdom of this rule. As the plaintiff averred in his complaint in the prior litigation, the attempts of the Government and others to carry freight by towboats and barges on the Mississippi had been unsuccessful prior to the execution of the agreement, and the parties understood at the time that the operations were "of necessity experimental in kind and required time in their development because of previous ineffective efforts to use the Mississippi River for similar purposes and because of the absence of current freight traffic of merchants and shippers on steamboats running upon the Mississippi River and the absence of public use and con-

[23] In the court below, plaintiff relied on a number of cases holding that where the seller delays delivery of chattels purchased for use in connection with the purchaser's business, and the delay results in loss of the use of other property employed in the business, the rental value of such other property may be considered in measuring the damage caused by loss of its use. *Griffin* v. *Colver*, 16 N. Y. 489, 496–497; *Witherbee* v. *Meyer*, 155 N. Y. 446, 449; *Boyle* v. *Reeder*, 23 N. C. 607, 614; *Gas Co.* v. *Glass Co.*, 56 Kan. 614, 625, 44 Pac. 621, 624. In all of these cases, however, the loss of use was certain and not speculative, and rental value was a reasonable measure of the loss since the claimant was the owner of the property.

fidence in freight traffic on the Mississippi River." *Goltra* v. *Weeks*, October Term, 1925, No. 718, R. 15–16.

3. *The court properly refused to consider the offer of the Standard Oil Company to rent the vessels.*—What has been said as to the admissibility of evidence of rental value applies, of course, to the evidence as to the offer of the Standard Oil Company to rent the vessels. The testimony clearly discloses that the Standard Oil Company proposed to operate the vessels for its own use, without regard to any restrictions as to rates or class of service (R. 67). The proposed rental has no bearing, therefore, on the question of the damages caused by the breach or taking of the agreement to lease. Since the market value and purchase price of the vessels were identical, there was no occasion to consider such evidence to determine the value of the option to purchase. And since prospective profits are not recoverable, the evidence as to the offer to rent was not admissible to show prospective profits.

The offer was properly excluded on other grounds. This Court held such offers inadmissible in *Sharp* v. *United States,* 191 U. S. 341, 348–350. It is true that in the *Sharp* case the offer was not testified to by the offeror, but the decision was placed on the broad ground that "oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value"

(*id.* at 349). As the authorities cited by the plaintiff show, offers have sometimes been held admissible by the lower federal courts upon a satisfactory showing that the offer was made in earnest and that the offeror was fully capable of making payment. The language quoted by plaintiff from the opinion in the *Sharp* case (at p. 349) affords no basis for such rulings, and other courts have held that all such offers are subject to the rule of the *Sharp* case. *Sommers* v. *Commissioner of Internal Revenue,* 63 F. (2d) 551, 553 (C. C. A. 10th); *Clarke* v. *Hot Springs Electric Light and Power Co.,* 55 F. (2d) 612 (C. C. A. 10th). In principle it would seem that offers by third parties to buy the property in suit should be excluded "because they have not been consummated and at best are expressions of opinion unsupported by the payment of hard cash." Orgel, *Valuation Under Eminent Domain* (1936), p. 503. Moreover, this particular offer was made during the prior litigation, when, as the offeror knew, the plaintiff was unable to enter into any lease, and the offer was, therefore, not sufficiently trustworthy as evidence of value to be admissible even under the cases cited by plaintiff.

The offer was subject to the further objection that it was made more than two years after the seizure of the vessels, the controlling date in the assessment of damages, and furnished no evidence of rental value at the time the breach of contract occurred. *Lewisburg R. R. Co.* v. *Hinds,* 134 Tenn.

293, 183 S. W. 985; *Santa Ana* v. *Harlin*, 99 Cal. 538, 34 Pac. 224; *Crosby* v. *Dorward*, 248 Ill. 471; 94 N. E. 78. Since the court was required to assess the damages as of the date of the breach or "taking" (*cf.* Fdg. 56, R. 49), it was bound to determine the relevance of the offer as of that date without benefit of hindsight evidence that the rental value remained unchanged after that date. The fact that objection to the admission of the offer was not made before the Commission is immaterial. The statute authorizing the Court of Claims to appoint commissioners (28 U. S. C. 269) specifically authorizes the court to consider any objection whether or not an exception was taken at the hearing before the commissioner, and there is nothing in the rules of that court to the contrary. The decisions of the Court of Claims cited by plaintiff are not in point. All of them were decided before the enactment of the statute providing for commissioners. Moreover, as the court expressly recognized in one of the cases (*Camden Iron Works* v. *United States*, 47 C. Cls. 124, 128), the court had power to sustain the objection and declined to do so in those cases only because of special circumstances not material here.

B. PLAINTIFF IS NOT ENTITLED TO ADDITIONAL RECOVERY ON ACCOUNT OF THE FOUR PERCENT INTEREST RATE IN THE OPTION PROVISION

The provisions of the contract according the plaintiff an option to buy the vessels prescribed an initial payment of the deposited earnings and that

the balance be paid in fifteen annual installments, with interest at 4 percent per annum (R. 19). The plaintiff introduced evidence that in order to secure a loan to finance the construction of a similar fleet at a cost of $3,590,000, the loan to be repaid in fifteen equal annual installments, plaintiff would have been required to pay interest at the rate of 6.138%, as compared with the 4% reserved by the contract, and plaintiff contends that the difference in interest rates was an element of value which the court below should have considered in rendering its award.[24]

However, the court below presumably took into consideration the interest rate. The court's stated that it did not consider rental value (R. 54), but it did not state that it did not give any effect to the interest rate, and its findings recite that the recovery allowed takes into consideration all relevant circumstances, including "the value for the * * * option to purchase. * * *" (R. 49). And we have shown that the option plainly had no value apart from the interest rate.

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[24] It may be observed in passing that, on the plaintiff's assertion as to rental value, Mr. Goltra could have realized a profit from rents of $13,280,045.46 by purchasing another fleet even at the increased cost of money, but this sum, although now deemed a reasonably reliable measure of damages, was apparently insufficient to induce Mr. Goltra to make the investment. The figure $13,280,045.46 is derived by subtracting the interest differential from $13,711,556.05, the rental value based on plaintiff's "interesting" reconstruction of the operation of the contract "in its entirety."

In any event the plaintiff has not shown any basis for recovery on account of the 4 percent interest rate. Under the accepted measure of damages for breach of a contract to sell property, the plaintiff is entitled to the amount, if any, by which the market value exceeded the purchase price. And since the purchase price was not to be paid immediately but over a period of fifteen years, it is necessary to determine the "present" or discounted value of the purchase price at the date of the breach or "taking" of the contract. Under the doctrine of *Chesapeake & Ohio Ry.* v. *Kelly*, 241 U. S. 485, the discounted value or "present worth" of the purchase price is the sum which, invested at the date of the breach or "taking" of the contract, would yield the fifteen annual installments plus 4% as the installments fell due. For the purposes of this inquiry, the *Chesapeake* case holds, the assumed rate of return on the sum so invested is not the "legal rate" of interest, but the earnings of the "best and safest investiments." This for the reason that any larger rate of return "is in part earned by the investor rather than by the investment" (*id.* at 490–491).

It is true that in the *Chesapeake* case the question presented was as to the measure of damages for loss of future support, but the principle is applicable here. The purchase price must be discounted to its equivalent at the date of the breach or taking; otherwise, indeed, the purchase price paid in installments at 4% interest would be actu-

ally greater than the market value at the date of the breach or "taking." And there is no basis in principle for assuming a different rate of return in ascertaining the "present worth" of a promise to pay money in the future than in determining the "present worth" of future earnings.

It seems clear, therefore, that if plaintiff had promised to pay in fifteen equal installments without interest, the plaintiff's damage would be the difference between $3,590,000 and the sum which invested at the "moderate return" (241 U. S. at 491) of the "best and safest investments" would yield $3,590,000 paid in fifteen annual equal installments. The plaintiff, however, promised to pay 4% on the unpaid balance. The inquiry, therefore, is whether the return on the safest investments is more or less than 4%.

The plaintiff has not sought to prove that the return on such investments is greater than 4%, presumably for the reason that, as appears from the uncontradicted evidence, the return on such investments between 1922 and 1936 varied from 2.4% to 4.36% in the case of United States Government Bonds, and from 3.25% to 5.12% in the case of high-grade corporate bonds (Deft. Ex. A-36, R. 82). Instead, plaintiff relies on testimony that no banking institution would have made a loan for the full amount of the cost of reproducing the fleet, and that the money could have been secured, if at all, only from private parties who would have

charged not less than 6.138%, plus a substantial discount, together with an interest in the operations of the vessels (R. 76–79). But the contention that plaintiff should recover the difference between this cost of money and 4% is contrary to well-settled principles of law, even treating the contract as an agreement to loan plaintiff money at 4% in order to pay for the fleet, the assumption most favorable to the plaintiff. Where a contract to borrow money is entered into to secure money to perform another contract or execute some other undertaking within the contemplation of the parties, the damages for breach of the agreement to loan money may be measured by the excess cost of negotiating another loan where such cost is actually incurred or, if such a loan cannot be or is not negotiated, by the benefit which would have inured from the contract or undertaking for the execution of which the loan agreement was made.[25] Plaintiff can recover nothing, however, for the loss of the contract to buy the vessels by means of the "loan", since it suffered no damage by reason of its inability to make the purchase. And it cannot recover the difference in the interest rates because it did not bor-

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[25] Williston on *Contracts* (Rev. ed. 1937), sec. 1411; Sedgwick on *Damages*, *supra*, sec. 622; *Gooden* v. *Moses*, 99 Ala. 230, 13 So. 765; *New York Life Ins. Co.* v. *Pope*, 24 Ky. L. Rep. 485, 68 S. W. 851; *Shurtleff* v. *Occidental Bldg. & Loan Ass'n*, 105 Neb. 557, 181 N. W. 374; *Bohemian-American W. G. Ass'n* v. *Northern Bank*, 120 N. Y. S. 134 (App. Term).

row the money and therefore did not incur the loss.[26]

In short, the 4% interest element in the contract is relevant only if it be shown that the present value of \$3,590,000 is greater than the value of the same sum invested at 4%. This the plaintiff cannot, and, indeed, has not sought to establish.

C. THE ITEMS OF DAMAGE CLAIMED BY PLAINTIFF FOR BREACH OF THE SUPPLEMENTAL CONTRACT WERE NOT PROPERLY ALLOWABLE.

The plaintiff also claims that the court below improperly excluded from consideration two items of damage claimed for breach of the supplemental contract dealing with the unloading apparatus, i. e. the rental value of the unloading apparatus and the expenses incurred by the plaintiff in providing watchmen to care for this apparatus after the date of this Court's decision in the prior litigation sustaining the Government's right to terminate the lease. In its opinion, the court below stated that its award constituted just compensation for the vessels "and unloading apparatus" and "all othe claims" (R. 55), but the court made no finding as to the amount, if any, allowed with respect to the apparatus or for the expense of providing watchmen. It is the Government's position that nothing should have been allowed on account of either item.

[26] *Bohemian-American W. G. Ass'n* v. *Northern Bank*, 120 N. Y. S. 134 (App. Term).

1. *The court below was not required to consider the rental value of the unloading apparatus.*—During the period of operations under the lease, the plaintiff's right to use the apparatus was without any value because of the restrictions in the lease previously discussed. The stipulation, it is true, recites that the apparatus had an annual rental value of $25,000 from the time of the seizure of the vessels to the present date (R. 67), but the stipulation, we think it will be agreed, was based on the assumption that the apparatus could be used in connection with operation of the fleet free of the restrictions imposed by the lease.

Nor is the rental value material on the question of the damages caused by breach of the agreement to sell the unloading facilities to the plaintiff. The supplemental agreement permitted the plaintiff to buy the apparatus on the terms and conditions governing the purchase of the fleet (R. 22, 31). The facilities were constructed in 1921 or sometime thereafter (Fdg. 50, R. 45–46) at a cost of $210,000, and the plaintiff has neither claimed nor offered any evidence to show that the market value of the apparatus at the time of the seizure of the vessels, taking its rental value, reproduction cost, or any other element, into consideration, was in excess of its cost. On any construction of the contract, therefore, the plaintiff failed to prove that the property was of greater value than the purchase price.

Moreover, by letter of February 13, 1930, the plaintiff offered to waive all claims for the use of the plaintiff's land and the expense of watchmen, if the United States or the Inland Waterways Corporation would convey to plaintiff the unloading facilities and deliver possession of the property on which it was located. To this offer the Acting Secretary of War replied that the United States claimed no right, title, or interest in the unloading apparatus or the land on which it was located, and that it waived whatever right it might be thought to have. The plaintiff apparently treated this letter as acceptance of his offer, for he forwarded it to the Chief of Engineers (one of the parties to the supplemental contract) with the request that the Chief of Engineers state whether he concurred in the Acting Secretary's reply. The Chief of Engineers answered in the affirmative (Fdg. 52, R. 46–47), and, so far as appears, all claims under the supplemental agreement, save those expressly excepted, were understood by the parties to be abandoned. In the court below, the plaintiff contended that the Government officers had no authority to abandon the property. It is evident from the plaintiff's petition, however, which treats the use and occupation of his land by the United States as ending in August 1930 (R. 12), that the plaintiff exercised dominion of ownership over the property after receipt of the Chief of Engineers' reply, and he cannot now challenge the validity of the admin-

istrative decision under which he has enjoyed the benefits of ownership. Indeed, if the Government is to be regarded as the owner, the plaintiff is liable for conversion, since under the supplemental agreement the apparatus did not become part of the realty (R. 22).

2. *The plaintiff's claim for the expense of maintaining watchmen for the unloading apparatus is specious.*—The claim is apparently limited to the amount paid for this purpose since the decision of this Court in *Goltra* v. *Weeks,* on June 7, 1926 (R. 68). And after that date, certainly, the plaintiff was under no obligation whatever to provide watchmen. The letter of Colonel Ashburn of July 18, 1923 (R. 75), might provide a basis for a claim for expenses incurred in caring for the vessels pending disposal of that litigation by this Court, but the letter made it plain that the plaintiff was not requested or expected to incure any such expense thereafter.

D. THE AWARD OF THE COURT OF CLAIMS WAS MORE THAN ADEQUATE

It thus appears that the plaintiff was entitled to recover nothing in excess of its expenditures and that in making its "jury award" (R. 55), the court below allowed the plaintiff $163,865.71 in excess of any legal damages resulting from the seizure. It seems clear that this sum represents the court's estimate of the "value for the lease,

option to purchase" the fleet (*cf.* Fdg. 56, R. 49) and the unloading apparatus (*cf.* R. 55). Presumably the court concluded that various provisions of the principal and supplemental contract, the freedom from any obligation to pay a fixed rental during the period of the lease, and the reasonable interest on the unpaid balance of the purchase price substantially reduced the plaintiff's risk in this hazardous adventure and should be considered in the award, even though on strict principle the plaintiff's damage in addition to his actual expenditures was only nominal. Certainly there is nothing to contradict the court's statement in its findings (Fdg. 56, R. 49) and its opinion (R. 55) that it considered the value of the agreements in the award, and a breakdown of the award clearly shows that a substantial sum was in fact awarded on this account. It is true that the court did not make an express finding as to the separate value of the agreements but, as we have shown, there was no competent or relevant evidence offered by plaintiff on this issue and the court could only make an estimate on the basis of the general character of the agreements themselves. Its award, as we have shown, was in fact too generous, but certainly the plaintiff cannot object on that account.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed

to the extent that it includes an allowance for interest and that, as thus modified, the judgment should be affirmed.

Respectfully submitted.

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DECEMBER 1940.

APPENDIX

Act of April 18, 1934, c. 150, 48 Stat. 1322:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

Section 177, Judicial Code, as amended (28 U. S. C. § 284):

(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b). [Subdivision (b) relates to tax cases exclusively.]

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